IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 847.

WILBUR JACKSON, FRANK WILLIAMS AND FREEMAN HOLTON,

Petitioners,

vs.

PATRICK J. BRADY, WARDEN OF THE MARYLAND PENITENTIARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

C. ARTHUR EBY,
WILLIAM CURRAN,
Attorneys for Petitioners.

The Daily Record Co. Print, Baltimore.

CONTENTS.

PETITION FOR WRIT OF CERTIORARI.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Table of Cases Cited.

Statutes.

Rules of Court.

Reports.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 847.

WILBUR JACKSON, FRANK WILLIAMS AND FREEMAN HOLTON,

Petitioners,

vs.

PATRICK J. BRADY, WARDEN OF THE MARYLAND PENITENTIARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Wilbur Jackson, Frank Williams and Freeman Holton, by C. Arthur Eby and William Curran, their attorneys, pray that a writ of certiorari may issue to review the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the above entitled case.

I.

MATTER INVOLVED.

The subject-matter of this proceeding relates to the decision of the United States Circuit Court of Appeals for the Fourth Circuit (reported in — F. (2) —; opinion by Soper, Cir. J., R. 110-121), affirming the decision of the District Court of the United States for the District of Maryland (reported in 47 Fed. Sup. 362; opinion by Chesnut, D. J., R. 1-21), dismissing after hearing the petition for habeas corpus which the petitioners, Negro State prisoners convicted of murder and now under sentence of death by a Maryland State Court, had sought upon the alleged ground that there had been racial discrimination in the selection and composition of the Grand and Petit Juries by which they had been indicted and tried in the State Court. The facts relating to such discrimination are fully set out in the transcript of the record accompanying this petition, and are summarized in the brief supporting the same.

II.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered on February 9, 1943.

The jurisdiction of this Court to review the decision in question is invoked under the authority of the Fourteenth Amendment to the Constitution of the United States which prohibits a State from denying to any person within its jurisdiction the equal protection of the laws.

III.

QUESTIONS PRESENTED.

The District Court, affirmed by the Circuit Court of Appeals, (Jackson v. Brady, supra) found that the petitioners had exhausted their remedies in the State Courts, without avail, to correct the judicial processes thereof, by appeal from the judgments of sentence by the State trial Court to the Court of Appeals of Maryland, the State's highest appellate tribunal (Jackson v. Brady, 26 Atl. (2) 815), and later by an unsuccessful application to a State Judge for release on habeas corpus, from whose decision no appeal is allowable in Maryland to any State Court, (Betts v. Brady, 316 U. S. 455) and that, therefore, there was no bar upon this ground to an application by the petitioners for habeas corpus in the United States Court.

The questions for review upon certiorari, therefore, are:

(1) Whether there was such racial discrimination in the selection and composition of the Grand Jury which indicted and of the Petit Jury which tried the petitioners in the State Court as would amount to a denial to them of the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States?

(2) Whether, under the facts and circumstances of the case, the petitioners waived their Constitutional rights?

Both the District Court and the Circuit Court of Appeals found in the negative as to the first question and in the affirmative as to the second question above stated.

In these findings and conclusions, it is submitted, there was error.

IV.

REASONS FOR GRANTING THE WRIT.

Reasons relied on for the allowance of a writ of certiorari in this case may be summarized as follows:

(1) That, under the decisions of this Court, the record shows that there was such racial discrimination in the selection and composition of the Grand and Petit Juries which indicted and tried the petitioners in the State Court as amounted to a denial to them of the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

(2) That the decision of the District Court and that of the Circuit Court of Appeals in this case are in conflict with the decisions of this Court upon the questions involved.

(3) That the question of racial discrimination, in the matter of jury selection and composition at the trial of the petitioners in the State Court, could not be determined by the Maryland Court of Appeals in the appeal from the judgments of the trial Court imposing the death sentence, for the reason that the challenge of counsel for the defendants to the jury array was overruled by the Court without development of the facts, and the record on appeal was, therefore, not sufficient upon the question. Certiorari to the Maryland Court of Appeals from this Court in the case would likewise have been ineffectual, for the same reason, to review the issues involved.

(4) That the petitioners, under the circumstances of the case, did not waive their Constitutional right to be

guaranteed the equal protection of the laws at their trial because:

(a) The trial Judge as the Chief Judge of the Supreme Bench of Baltimore City, the members of which under the statutory law select the Grand Jurors for Baltimore City, knew that the Grand Jury of twenty-three members which indicted the petitioners, as well as each Grand Jury for many years past in Baltimore City, had been arbitrarily limited to one member of the colored race, which method of selection amounted to unlawful racial discrimination, in the case of a Negro, indicted, and it was, therefore, the duty of the trial Judge to protect the petitioners in their Constitutional rights, whether or not they made a specific objection to the Grand Jury as so constituted.

(b) That, where the presiding Judge knows the facts, a Negro defendant ought not to be prejudiced by being forced either to make formal complaint that he is the victim of racial discrimination, or, failing to make such complaint, be held to have waived his right to object.

(c) That the petitioners' counsel, during the examination of jurors on their voir dire at the trial in the State Court, did challenge the array of Petit Jurors upon the ground of racial discrimination in their selection, but their challenge was promptly overruled by the presiding Judge who discouraged further inquiry into the matter (R. 37-39).

(d) That it was not practical, and indeed may have been prejudicial to the Negro defendants, at the opening of their trial, to inquire into the question of racial discrimination in the selection of the Petit Jury panels.

(5) That it is apparent, under the decisions of this Court, that the methods employed in the selection of the Grand and Petit Juries which indicted and tried the petitioners in the State Court amounted to racial discrimination against the petitioners, and if the sentences of death imposed by the State Court are carried out because of a technicality in failing to interpose timely objection, then the petitioners will be executed without due regard to their Constitutional rights. This Court has the power to prevent such a wrong. The release of the petitioners on habeas corpus will not preclude their re-indictment and re-trial in accordance with Constitutional methods, and such procedure would not involve the question of former jeopardy (Hill v. Texas, 316 U. S. 400, 406; Mitchell v. Youell, 130 Fed. (2) 880, 882.

(6) If there is any doubt whatever that the petitioners were protected in their Constitutional rights at their trial, which resulted in the imposition of the death sentence, then the judgments of execution should not be carried out, and a full review of their case by this Court should be granted. The petitioners should not be held to have waived rights so important as those which are guaranteed by the Constitution and which are designed to afford to all persons of whatever race, creed or color —the least deserving as well as the most virtuous—the equal protection of the laws.

V.

TRANSCRIPT OF RECORD AND SUPPORTING BRIEF.

The petitioners submit with this petition a certified copy of the transcript of the record, including all proceedings in both the District Court and the Circuit Court of Appeals, and a brief in support of this petition.

WHEREFORE, it is respectfully submitted:

(1) That this petition should be granted, and that a writ of certiorari should issue as herein prayed;

(2) That the petitioners may have such other and further relief, remedy and processes in the premises as to this Court may seem proper.

C. ARTHUR EBY,
WILLIAM CURRAN,
Attorneys for Petitioners.

State of Maryland, City of Baltimore, to wit:

C. Arthur Eby, being duly sworn, deposes and says that he is one of the attorneys for the petitioners, Wilbur Jackson, Frank Williams and Freeman Holton; that he prepared the aforegoing petition; and that the allegations thereof are true as he verily believes.

C. ARTHUR EBY.

Subscribed and sworn to before me by the said C. Arthur Eby, this 22nd day of March, 1943.

THELMA B. TODD,
Notary Public.

(Seal.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 847.

WILBUR JACKSON, FRANK WILLIAMS AND FREEMAN HOLTON,

Petitioners,

vs.

PATRICK J. BRADY, WARDEN OF THE MARYLAND PENITENTIARY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL GROUND

The purpose of a review of this case upon certiorari is to determine whether or not the Negro petitioners, at their trial in the State Court upon a charge of murder which resulted in their conviction and imposition of the death penalty, were accorded their full legal rights guaranteed to them by the Constitution of the United States. The petitioners are now State prisoners awaiting execution, who, after exhausting their remedies in the State Courts, sought release upon habeas corpus in the District

Court of the United States. That Court, after hearing, denied such relief, and its decision was affirmed by the Circuit Court of Appeals. The petition for certiorari to review the case is addressed to this Court under the authority of the United States Statutes which permit such review of a habeas corpus case.

28 USCA, secs. 347 and 462(c).

QUESTIONS IN CONTROVERSY

The specific questions to be determined upon review are:

1. Was there such racial discrimination in the selection and composition of the Grand and Petit Juries which indicted and tried the petitioners in the State Court as would amount to a denial to them of the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States?

2. Did the petitioners, under the facts and circumstances of their case, waive their Constitutional rights?

FACTS OF THE CASE

The petitioners, three Negroes, were jointly indicted by a Grand Jury of the State of Maryland for Baltimore City, composed of twenty-two white men and one Negro, on September 24, 1941, on a charge of murder, and were thereafter jointly tried by a Judge and Jury in the Criminal Court of Baltimore City. A verdict of guilty was found on October 29, 1941. A motion for a new trial was overruled by the Supreme Bench of Baltimore City, acting under the authority of the Maryland Constitution (Art. IV, Sec. 33) to hear and determine mo-

tions for new trial arising upon certain questions. The trial Court thereupon, on December 18, 1941, imposed the death sentence upon each of the accused. The case was then appealed by each defendant to the Court of Appeals of Maryland, the State's highest appellate tribunal, and the decision of that Court (Jackson v. Brady, 26 Atl. (2) 815) affirmed the judgments of the State trial Court.

The Maryland Court of Appeals, however, having no evidence before it in the record on appeal relating to the question raised by counsel as to racial discrimination in the jury selections, could not determine that point, although it had been urged by counsel before the appellate Court. This is made clear in the Court's opinion, where it is stated that the record contained no evidence to show intentional exclusion of Negroes from the Grand Jury or from the list of Petit Jurors from which the special trial panel was chosen. The fact is that the record contained no evidence whatever upon that point, since inquiry upon the question was not pursued after the trial Court overruled the challenge of counsel to the jury array with the discouraging remark that the point was "sour".

Jackson v. Brady, 26 Atl. (2) 815.

For the same reason that record was not sufficient to present the issue involved to this Court on certiorari.

Thereafter application was made on behalf of the petitioners to a Maryland State Judge for a writ of habeas corpus to inquire into the constitutionality of the State Court trial, but the writ was refused. No appeal lies from such action of a State Judge.

Betts v. Brady, 316 U. S. 455.

The petitioners had, therefore, exhausted their remedies in the State Courts prior to their application to the Federal Court for relief.

Smith v. O'Grady, 312 U. S. 329;
Mooney v. Holohan, 294 U. S. 103.

The facts relating to the manner and practice of selecting Grand and Petit Jurors for Baltimore City, with particular reference to racial discrimination, were later developed at the hearing of the habeas corpus case instituted in the District Court of the United States for the District of Maryland on behalf of the petitioners, which case is the subject matter of the petition for certiorari now addressed to this Court.

The record, by the testimony of the jury clerk to the Supreme Bench of Baltimore City who had served 17 years in that capacity (R. 45-56; 65-78), and the further testimony of the Chief Judge (R. 28-42) and an Associate Judge (R. 14-23) of the Supreme Bench of Baltimore City, and from other evidence offered, briefly summarized, shows the following pertinent facts:

That, by the 1940 U. S. Census, the Negro population of Baltimore City is shown to be 19.3% of the total population (R. 40).

That during the years 1933 through 1941 a total of 16,695 white men and 280 colored men served on the Petit Juries of Baltimore City, and that during the same period of time a total of 594 white men and 27 colored men served on the Grand Juries for Baltimore City, that is, 1 Negro on each Grand Jury of 23 members, there being 3 Grand Juries each year (R. 39).

That the service files of jurors for Baltimore City kept by the jury clerk show a total of 18,901 white jurors and 653 colored jurors qualified for service as of October 9, 1942, which numbers were substantially the same as of the term of Court at which the petitioners were tried (R. 40).

That in the year 1941 a total of 4,950 men were summoned by the Sheriff for regular jury service in Baltimore City Courts, of which only 54 were colored. In addition thereto 100 men were summoned as a special panel of which none was colored (R. 58).

It will thus be seen that the 280 Negroes who served on Petit Juries in Baltimore City during years 1933 through 1941 constituted 1.6+% of the total number of 16,975 jurors, both white and colored, who thus served during that period of time; and that the 653 Negroes on the active service list of jurors for Baltimore City at the time of trial were 3.3+% of the total of 19,554, both white and Negroes, on that list.

It is a concessum in the case that each Grand Jury for Baltimore City, the members of which are selected under authority of the local statutory law by the Judges of the Supreme Bench of Baltimore City, for many years, has been composed of 1 Negro and 22 white men.

This great disparity between the number of white persons and Negroes who have been called to serve on the Grand and Petit Juries of Baltimore City throughout the years, it is contended, is due to systematic and arbitrary discrimination against Negroes, which follows from the practices and methods employed by Court officials in selecting jurors for Baltimore City, and is not

the result of any racial discriminatory law relating to jury selections.

For Law Relating to Jury Selections in Baltimore City, see
Public Local Statute (R. 21-32);
Supreme Bench Rule No. 6 (R. 33-37).

The practice followed in selecting Petit Juries for Baltimore City, as shown by the record, at the time of the trial in question and for many years prior thereto, consisted in having the jury clerk send out notices to male persons generally, including some colored persons, whose names are taken promiscuously by him from the city and telephone directories and from other sources, requesting them to appear for jury service.

The jury clerk alone determines in the first instance who shall be so notified. Those persons chosen by him are then notified to appear before a member of the Supreme Bench of Baltimore City acting at the time as Jury Judge.

See Form of Notice (R. 41-42).

Approximately 2,000 persons are so notified each year to appear for examination before the Jury Judge, at which time they are required to fill out a questionnaire.

See Form of Questionnaire (R. 42-44).

After a preliminary examination these persons are either qualified or rejected by the Jury Judge. The names of those qualified are then placed in the service files to be called according to the month of the year most convenient to the jurors to serve. The names of the white and colored persons are typed on differently colored service file cards to distinguish them. Approxi-

mately 20,000 such eligibles are kept in the service files which are replenished once or twice a year to retain that number.

When drawings are made, 750 names are taken from the service files, and typewritten on small ballots which are placed in the jury wheel, the letter "c" being typed after each Negro's name on the ballot. According to his practice, the jury clerk always arbitrarily and without instructions from anyone limits the number of colored persons whose names are placed in the jury wheel to 25 out of a total of 750 names, with a slight variation of one or two more names of colored men in some instances, but his aim is to have 25 names of Negroes out of a total of 750 names in the jury wheel at each drawing (R. 52-56). When drawings are made the ballots are withdrawn from the jury wheel by lot in the presence of the Jury Judge and from those so drawn and later summoned the jury panels of 25 each are made up and sent to the several Common Law and Criminal Courts for service.

The method just described accounts for the very few colored persons who have been called for jury service in Baltimore City during the past years.

At the trial of the petitioners, in the selection of a special jury panel and while the jurors were being examined on their voir dire, counsel for the accused, after there had been submitted some 52 jurors from several panels of which number only 2 were Negroes, made objection by challenging the array of jurors on the ground that the jury was not being selected in accordance with the State and Federal Constitutions. The Court overruled this objection, remarking to counsel: "Your point is sour." Exception to this ruling was taken (R. 37-39).

After this, additional jurors, all white, were submitted, and the panel of 12 was finally selected on which were no members of the accuseds' race, the 2 colored jurors submitted having been peremptorily challenged and struck by the State as allowed by the Maryland Statutory Law.

Md. Code P. G. L. (1939), Art. 51, Sec. 19.

ARGUMENT.

I.

THERE WAS SUCH RACIAL DISCRIMINATION IN THE SELECTION AND COMPOSITION OF THE GRAND JURY WHICH INDICTED, AND OF THE JURY LISTS FROM WHICH THE SPECIAL JURY PANEL WHICH TRIED THE PETITIONERS WAS CHOSEN, AS AMOUNTED TO A DENIAL TO THEM OF THE EQUAL PROTECTION OF THE LAWS.

We most urgently contend that, under the system followed by Court officials as shown by the record in this case, there is such racial discrimination in the selection and composition of the Grand and Petit Juries for Baltimore City as has been denounced by this Court.

Strauder v. West Va., 100 U. S. 303 (1880);
Neal v. Delaware, 103 U. S. 370 (1881);
Norris v. Alabama, 294 U. S. 587 (1935);
Hale v. Kentucky, 303 U. S. 613 (1938);
Pierre v. Louisiana, 306 U. S. 354 (1939);
Smith v. Texas, 311 U. S. 128 (1940);
Hill v. Texas, 316 U. S. 400 (1942).

See also:

Lee v. Md., 163 Md. 56 (1932).

While the early cases in which this Court condemned racial discrimination in jury selection involved total exclusion of Negroes from the jury lists, in the late case of

Smith v. Texas, supra, this Court held void the conviction of a Negro who had been indicted by a Grand Jury of a Texas County where Negroes constituted 20% of the total population, and where the Court records showed that during a period of seven years only 5 of the 384 Grand Jurors who had served during that time were Negroes, and that of 512 summoned to serve only 18 were Negroes, and that, because of devious methods of selection by Court officials, of 32 Grand Jurors empanelled only 5 had Negro members while 27 had none.

It is seen, therefore, that there may be unlawful racial discrimination in the selection of jury lists without total exclusion of Negroes.

Commenting upon the case of *Smith v. Texas, supra,* a Committee on Selection of Jurors, composed of District Judges of the United States, in its report on September 8, 1942, to the Conference of the Chief Justice with the Senior Circuit Judges of the United States, gives a salutary warning to the Courts in the following language:

> "Since the 'Scottsboro' cases, it has been the practice in several courts to include in the jury boxes the names of a few negroes to avoid the violation of the Fourteenth Amendment. The validity of this method may be questioned in the light of the Supreme Court's language in the case of Smith v. Texas, 311 U. S. 128 (1940)."
>
> Report, pp. 18-22.

We respectfully contend that the instant case comes clearly within the principle established in *Smith v. Texas, supra,* and that any method, whereby the members of any particular race or group are arbitrarily lim-

ited in number for jury service, is discriminatory in character, and should be condemned by this Court.

If it was unconstitutional to limit the number of Negro Grand Jurors in *Smith v. Texas, supra,* as decided by this Court, then it is likewise an unlawful discrimination against the Negro in Baltimore City to permit only one of his race to serve on each Grand Jury of 23 members and to limit the Negro representation upon the Petit Jury lists from which the panels of jurors are chosen to 25 in each 750 names selected. This is particularly true since the Negro population of Baltimore City is 19.3% of the total and when it is a well-known fact that a high percentage of those Negroes are sufficiently intelligent and educated to be competent jurors.

We submit that the paucity in number of Negroes who have been called for service upon the Petit Juries of Baltimore City was explained by the jury clerk when he testified that it was his practice to place the names of only 25 Negroes in the list of 750 names which went into the wheel from which the jurors were drawn. The confirmation of his testimony is in the figures showing how many whites and how many Negroes were, in fact, drawn from the wheel.

It is important, in considering the testimony of the two Judges of the Supreme Bench of Baltimore City, as shown by the record, to keep in mind that it would make no difference at all whether the number of Negroes who were qualified by the Jury Judge as fit and available for jury service was large or small. No matter how many Negroes were on the qualified list, 25 and only 25 would be used.

So long as there were available qualified Negroes in excess of 25 (the stipulation shows at all times 653 qualified Negro jurors, R. 40), it must follow that in making up the 750 list that the Negro as such was discriminated against by the application of the jury clerk's rule of 25 Negroes for every 750 possible jurors.

It is submitted that the figures appearing in the stipulation of persons qualified for jury service, to wit: Whites, 18,901, Negroes, 653 (R. 40), do not indicate that only 653 Negroes could be found in the total number of qualified jurors of 19,554. Under the jury clerk's rule of 25 Negroes for every 750 jurors, a ratio of 1 in every 30, there would be no need to build up a service file of Negroes in any greater proportion than 1 Negro in every 30 jurors to be qualified. This is the true reason for the relatively few Negroes on the qualified jurors' list. It can hardly be argued that in the male Negro population over 25 years of age in Baltimore City, only 653 persons can be found to qualify.

The ratio in the service files is slightly greater than 1 in 30. It will be noted that the proportion resulting from the application of the jury clerk's rule in the case of Petit Juries is not greatly at variance with the proportions established over the years by the Supreme Bench of Baltimore City itself, in drawing Grand Juries—1 Negro Grand Juror for every 23 Grand Jurors; always 1, never more, never less.

The testimony of the Supreme Bench Judges, therefore, respecting the relatively greater difficulty of obtaining Negroes than whites for jury service is, in the circumstances of this case, quite immaterial. If the Negroes who qualified and were available equalled in num-

bers the whites there would still go in the 750 list the same number of 25.

Another fact to be kept in mind, in considering the Judges' testimony, is, that the number of Negroes on each Grand Jury remains 1 throughout the years; and on the Petit Juries the ratio of Negroes to whites has remained substantially constant for the past 9 years. The ratio does not vary with the ups and downs in employment, nor with the increase in population; what it was before the inauguration of the Public Relief System, it remained during the years that the system was flourishing. It remains the same in peace times as in war times.

It is a matter of common knowledge that in the past 20 years the Negro has made great strides, economically and educationally, yet the jury clerk's rule of 25 out of 750 has not changed during his 17 years in office, and the rule was in effect for some years prior thereto (R. 55).

Another comment on the suggestion that it is relatively more difficult to obtain Negro than white jurors is, that the difficulty, if it exists, may in part be accounted for by the reluctance or diffidence of the ordinary Negro to serve where he knows he will be one among 22 others of the Grand Jury, all of whom will be of the white race; and, in the case of the Petit Jury panels, that he will ordinarily be just one (occasionally he will have a fellow Negro), among 24 whites.

It is clear, therefore, that the selection of jurors for Baltimore City, under the methods described in the testimony is—

(1) Arbitrary, in that:

(a) It is left to the judgment and sole discretion of one man, the jury clerk, to determine in the first instance, what persons shall be notified to appear for jury service;

(b) The jury clerk alone decides that the names of 25 Negroes only of a total of 750 names shall be placed in the wheel each time there is a drawing for jury service; and

(c) The selection of one Negro for each Grand Jury is the result of a decision and practice without reason.

(2) Systematic, in that:

It has been practiced for many years according to a system which has been designed and followed by the jury clerk alone, as to Petit Jurors (apparently without the actual knowledge of members of the Supreme Bench), without variation, without regard to increase in population, without consideration for changes in the economic conditions of the City or its people, or the ups and downs in employment.

It makes no difference whether the scheme is unintentional or otherwise, ingenuous or ingenious, its result is the same—discrimination against the Negro because of his race. The system cannot be defended, and it is respectfully submitted that it should receive the condemnation of this Court.

Smith v. Texas, 311 U. S. 128, 132.

This Court has held that it is not at liberty to grant or withhold the benefits of equal protection of the laws, which the Constitution commands for all, merely as it may deem the defendant innocent or guilty.

Hill v. Texas, 316 U. S. 400, 406,

Citing:

Tumey v. Ohio, 273 U. S. 510, 535.

The question in the instant case is an important one, and should be determined by this Court after a full review of the facts and the applicable law and judicial decisions. This is especially true at this time when the proper method of jury selections has been made the subject of special study by a Committee of United States District Judges, and when it is to be presumed that appropriate legislation and Rules of Court will be enacted and adopted upon the subject. The guidance of this Court by the enunciation of general principles upon the question at issue is needed at this time.

In a community containing a large Negro or other minority racial group, what number of qualified representatives of that race would be considered suitable and adequate representation on the jury lists? Certainly, there can be no exclusion of such a minority group as this Court has definitely decided. And, in *Smith v. Texas, supra,* a small number of Negroes on the Grand Juries from time to time made the indictment of a Negro under such circumstances void. This Court will have an opportunity by a review of the present case to lay down the general principles of law which will greatly aid in determining what would be fair and adequate racial representation in a case presenting facts such as the one for which a review is here sought.

We respectfully submit that 1 Negro on a Grand Jury of 23 members and 25 Negroes in each 750 jurors from which the Petit Jurors are drawn is not a fair and adequate representation of the Negro minority racial group which constitutes 19.3% of the total population of Baltimore City. The Negroes indicted and tried by Grand and Petit Juries constituted as shown by the facts in the instant case did not receive at their trial the equal protection of the laws to which they were entitled under the Fourteenth Amendment to the Constitution of the United States.

II.

THERE WAS NO WAIVER OF THE CONSTITUTIONAL RIGHTS OF THE PETITIONERS, UNDER THE FACTS AND CIRCUMSTANCES OF THE CASE, AT THEIR TRIAL IN THE STATE COURT.

There would appear to be no doubt that, under the decisions of this Court, there is racial discrimination against Negroes according to the practice followed by Court officials in the selection of the Grand and Petit jurors for service in the Baltimore City Courts. We contend that the indictment and trial of a Negro by jury panels so selected and composed is void.

The point made by the State is, that the petitioners did not interpose any objection to the constitution of the Grand Jury prior to their trial and conviction, and that they inadequately presented their objections to the methods employed in the selection of the lists from which the Petit jurors were drawn.

We do not contend that the indictment of a Negro by a Grand Jury composed of 1 Negro member is necessarily void because of racial discrimination. But when every Grand Jury over a period of many years is lim-

ited to 1 Negro out of 23 members that does constitute racial discrimination such as has been condemned by this Court, and the indictment of a Negro in such a case is void.

While it is true that counsel for the petitioners did not specifically object to the constitution of the Grand Jury in the present case prior thereto, they did make the point of race discrimination at the opening of the trial by challenging the whole array of jurors. This, we contend, was sufficient to include the Grand Jury which indicted the petitioners. We would call the Court's attention to the fact that the statutory law regulating the selection of Grand and Petit Jurors for the Courts of Baltimore City (Secs. 687 and 689, R. 21-22) directs that the 23 Grand Jurors be selected by the Judges of the Supreme Bench of Baltimore City from a qualified list of 750 jurors. Hence, by statutory requirement, the Grand and Petit Jurors are taken from the same qualified lists. If these lists are illegally selected, as we have herein pointed out, by reason of racial discrimination, then the Grand Juries as well as the Petit Juries are subject to the same defect. Therefore, the challenge to the whole array of jurors made at the opening of the trial would go to the Grand Jury as well as to the lists from which the Petit jurors are chosen. We make the point, then, that the challenge at the beginning of the trial had the effect of reaching both the Grand and Petit Juries.

As to the adequacy of presentation of the point of objection we again direct the Court's attention to the fact that 3 Negroes were being tried; that it was a certainty that under the system followed the jury would consist of all white men, the State having the right of peremptory challenge to the extent of 30 jurors in the joint trial of 3

men (Md. Code, P. G. L., 1939, Art. 51, Sec. 19), and in fact the State did strike the two Negro jurors presented; that at the opening of the trial under these circumstances there was great probability of raising a race issue which would react to the prejudice of the men on trial; that the trial Judge was the Chief Judge of the Supreme Bench of Baltimore City and as such had, or should have had, full information as to the manner and method of selecting jurors, both Grand and Petit, for service in the Baltimore City Courts; that the Judge certainly discouraged any inquiry upon the point, as we have herein pointed out; that in such a case the defendants on trial should not be bound to pursue inquiry upon a point which the Court indicated at the outset would be overruled, and the effect of which inquiry would undoubtedly be ineffectual with the Court and adverse to the defendants. Under these circumstances, we submit, that the petitioners sufficiently made the point of racial discrimination to put the Court on notice and if necessary to stop the trial until a legally constituted jury could be obtained, and if the State Courts, both trial and appellate, did not follow such procedure, and did not decide the question because of a lack of sufficient evidence in the record, then it is incumbent upon the Federal Court on habeas corpus to pursue the inquiry to determine whether or not the petitioners were accorded their full constitutional rights at the trial which resulted in their conviction and the imposition of the death penalty.

It is apparent that the State Courts did not properly safeguard the petitioners' constitutional rights, the State appellate Court avowedly refraining from a decision of the point upon the ground that the record before it did not sufficiently disclose the facts relating to the jury selections, and that prejudice would not be inferred.

In this situation the petitioners are now entirely dependent upon this Court to review their whole case fully in order to determine whether or not their constitutional rights were protected at their trial in the State Court.

Frank v. Mangum, 237 U. S. 309 (1915);
Moore v. Dempsey, 261 U. S. 86 (1923);
Mooney v. Holohan, 294 U. S. 103 (1935).

An analysis of the cases cited by the distinguished Judges who wrote the opinions of the District Court and the Circuit Court of Appeals, respectively, to substantiate the fact of waiver by the petitioners of their constitutional rights, will show that in each instance such waiver was definite, intentional and deliberate, or that there was a complete failure to make the point before the trial Court. The instant case presents a different state of facts, as we have herein pointed out.

CONCLUSION.

Having fully demonstrated that there was such racial discrimination as made void the indictment and trial of the petitioners in the State Court, we contend that, under all the facts and circumstances of the case, there was no waiver of the right of the petitioners to the equal protection of the laws at their trial, and we, therefore, respectfully submit to this Honorable Court their petition for certiorari to review their case fully in order that their constitutional rights may be properly safeguarded.

Respectfully submitted,

C. ARTHUR EBY,
WILLIAM CURRAN,
Attorneys for Petitioners.

30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 847.

WILBUR JACKSON, FRANK WILLIAMS AND FREEMAN HOLTON,

Petitioners,

VS.

PATRICK J. BRADY, WARDEN OF THE MARYLAND PENITENTIARY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

WILLIAM C. WALSH,
Attorney General of Maryland,

D. HEYWARD HAMILTON, JR.,
Assistant Attorney General,

J. BERNARD WELLS,
State's Attorney of Baltimore City,

DOUGLAS N. SHARRETTS,
Asst. State's Attorney,

JOSEPH G. FINNERTY,
Asst. State's Attorney,

Attorneys for Respondent.

The Daily Record Co. Print, Baltimore.

INDEX

Table of Cases

TABLE OF DIGESTS

TABLE OF STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 847.

WILBUR JACKSON, FRANK WILLIAMS AND FREEMAN HOLTON,

Petitioners,

VS.

PATRICK J. BRADY, WARDEN OF THE MARYLAND PENITENTIARY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

I.

OPINIONS OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit was unanimous, is officially reported in 133 F. 2d 476 and is found on pp. 110-121, inclusive, of the Record. The opinion of the District Court of the United States for the District of Maryland is officially reported in 47 F. Supp. 362 and is found on pp. 9-21, inclusive, of the Record. The opinion of the Court of

Appeals of Maryland, which affirmed the convictions of the three petitioners, is officially reported under the name of *Jackson, et al. v. State of Maryland* in 180 Md. 658 (26 Atl. 2d 815). The Criminal Court of Baltimore City, in which the Petitioners were tried, delivered no opinion.

II.

JURISDICTION.

The brief of the Petitioners (p. 10) states that the petition for certiorari is filed under the authority of Sections 347 and 462 (c) of Title 28 of U. S. C. A. There is no Section 462(c) and if Section 463(c) was meant, it has no application to the case at bar. Section 347 only permits, does not grant a right to, review by certiorari. This Court will grant the review only where it finds in the Record special and important reasons therefor. Paragraph 5 of Rule 38 of the Court.

The Respondent contends that none of the reasons set forth in sub-paragraph (b) of paragraph 5 of the Rule is present, that there are no other valid reasons why the writ should issue and that the findings of fact and conclusions of law, made by the District Judge (R. 2-9) and affirmed by the Circuit Court of Appeals, are correct and should be confirmed by a denial of certiorari.

III.

QUESTIONS IN CONTROVERSY.

The Respondent does not agree with the Petitioners' statement of the questions in controversy.

The Petitioners have totally ignored a question which was brought to the attention of both the District Court and the Circuit Court of Appeals and fully argued before them. Neither court, however, decided the question for

the reason that each of them agreed with the Respondent that there was no discrimination against the Petitioners and that, in any event, the right to complain of discrimination had been waived. The question goes to the jurisdiction of the District Court to review the judgment of a State Court which admittedly had jurisdiction to try the traversers and, because of the decisions in *Wood v. Brush,* (140 U. S. 278) and *Andrews v. Swartz* (156 U. S. 272), should be brought to this Court's attention. The question assumes, only for argument, that there was discrimination, is of considerable importance to the administration of justice by the courts of the State of Maryland and may be stated as follows:

> Has a federal district court, under the facts in the case at bar, jurisdiction to release on habeas corpus negroes, convicted in a state court having jurisdiction of the offense and of the accused, solely on the ground that they were tried by a jury in the impanelling of which the jury officials of the State discriminated against their race?

In the second place, we disagree with the Petitioners' statement of the first question, because the three attorneys, appointed at the expense of the State to defend them at their trial in the Criminal Court of Baltimore City (R. 2, 111), made no mention of the grand jury at any time during that trial and made no objection, either by motion to quash or otherwise, to its composition or to the indictment which it returned. Both the District Court and the Circuit Court of Appeals found these to be the facts (R. 8, 9, 114, 116). For these reasons, the first question should be stated as follows:

> Was there, on the evidence in the Record, such intentional, arbitrary or systematic discrimination against negroes or exclusion of them from the petit jury panels in Baltimore City as would amount to a

denial to the Petitioners of the protection of the Fourteenth Amendment to the Constitution of the United States?

The Respondent concurs in the Petitioners' statement of the second question.

IV.

STATEMENT OF THE CASE.

The Respondent does not concede that the Petitioners' statement of facts is either complete or entirely accurate and, by way of supplement, calls the following facts to the Court's attention:

The trial judge appointed three able and experienced lawyers to defend the traversers at public expense (R. 2, 111). The trial began on October 23, 1941, and lasted six days. The judgments of conviction of murder were affirmed by the Court of Appeals of Maryland on June 17, 1942, and the second of October of that year was fixed as the date of execution. An application for a writ of habeas corpus was presented to a judge of the Supreme Bench of Baltimore City on October 1, 1942, and was denied the same day (R. 2). No review of that denial by a petition for certiorari from this Court was sought, though that remedy was open. *Betts v. Brady* (316 U. S. 455). Later on the same day a petition for the writ was filed with the District Court of the United States for the District of Maryland and that Court immediately ordered the writ to be issued, returnable on the sixth of that month (R. 3).

On the question of waiver, the Record shows as follows:

At the beginning of the trial in the Criminal Court 52 talesmen were sworn and examined on their voir dire and only 8 jurors were chosen from that number. Thereupon,

more talesmen were brought into the Court room to be similarly examined (R. 37-38). At that point one of the attorneys for the Petitioners for the first time objected to the fact that out of the 52 talesmen submitted only 2 had been negroes. The challenge was an oral one and was overruled without proffer of testimony or effort by any of the attorneys for the Petitioners to argue the same (R. 39).

On the question of discrimination, the Record shows as follows:

The percentage of colored jurors over the period from 1933 to 1941, both inclusive, has varied from 1 or 2 to 3 or 4 percent of the whole number of jurors (R. 6, 39). Of the persons in Baltimore who in 1940 were 25 years of age or more and had completed 7 or 8 years of grade school, 60% were male whites and 20% male negroes. Of those who had completed high school or some part thereof, the proportion of whites was about 22% and of the negroes about 8% of the total population (R. 6, 74-78).

The proportion of colored to white men, actually summoned for and rendering jury service, was determined by lot alone (R. 52, 88). The actual number of negroes who served in 1937 was almost a half again as many as those who served in 1933, while the number in 1941 was almost twice as many as that in 1933 (R. 6, 39). Of the 7 panels of 25 jurors each, who were drawn at the September term of Court 1941, at which the Petitioners were tried, there were 8 negroes out of a total of 175, or a percentage of 4.57 (R. 107-108).

The uncontradicted testimony was that the Jury Clerk and two Judges of the Supreme Bench made extensive and strenuous efforts to secure the names of qualified

negroes for the service file of prospective jurors, from which the actual talesmen were chosen at least three times a year (R. 7, 46, 80, 81, 97, 98, 114).

No evidence was produced to show the comparative number of white and colored persons selected by the Jury Clerk once or twice a year for examination as to their qualifications for jury service, although the questionnaires were delivered to the Jury Clerk after being marked by the Jury Judge and presumably were available to counsel for the Petitioners (R. 18, 49, 50, 92). There was no evidence introduced, and the charge was not made, that in making up the lists of persons to be examined or in passing upon their qualifications either the Jury Clerk or the Jury Judge excluded persons because they were negroes (R. 7, 9, 16, 17, 18, 19, 113).

Under the Maryland statutes only males over 24 and under 71 years of age, who are residents of Baltimore City (R. 22), are eligible and no distinction is drawn by the statutes between negroes and whites. All delegates, coronors, constables, schoolmasters, physicians, pharmacists, dentists, judges of the Orphans' Court, judges and clerks of elections, persons having pending litigation in Court, persons who have served as petit jurors within two years and certain members of the organized militia are exempt by Statute (R. 3, 4, 42-44, 86).

It has been the policy of the Supreme Bench to reject men convicted of any crime and the percentage of convictions for crime is higher among the negroes than among the whites (R. 8, 114). It has also been the policy of the Bench not to accept for the service file persons on relief and in the years immediately preceding the trial of the Petitioners a much larger percentage of negroes than of whites was on relief (R. 99, 114). It has been the practice of the

Bench to excuse from actual service on the jury panels office holders and employees of the City, State and Federal Governments upon their request (R. 48, 84, 86). The great majority of negroes most highly qualified for jury service fell into the exempted classes or asked to be excused, and the number of negroes in those classes constituted a small part of the total negro population (R. 80, 86, 87, 100). The remaining part of the negro population consisted largely of hourly laborers in large industrial plants and it was difficult to use these men on jury panels without actual compulsion (R. 21, 23, 100, 101). Unless it is necessary, the Bench does not require jury service of small business men or hourly laborers if such service would cause them financial sacrifice (R. 87, 103-104).

The District Court found as an ultimate fact from the evidence in the case that there had been no intentional and systematic exclusion of negroes from juries in Baltimore City and no discrimination against them in practice on account of their race or color in the selection of juries by the Supreme Bench of Baltimore City (R. 9, 114).

We believe that all the pertinent facts are found in the findings of fact made by the District Judge (R. 2-9) and that these findings are amply supported by substantial evidence.

V.

ARGUMENT.

A.

A FEDERAL DISTRICT COURT, UNDER THE FACTS IN THE CASE AT BAR, HAS NO JURISDICTION TO RELEASE ON HABEAS CORPUS NEGROES, CONVICTED IN A STATE COURT HAVING JURISDICTION OF THE OFFENSE AND OF THE ACCUSED, SOLELY ON THE GROUND THAT THEY WERE TRIED BY A JURY IN THE IMPANELLING OF WHICH THE JURY OFFICIALS OF THE STATE DISCRIMINATED AGAINST THEIR RACE.

This Court held in *Wood v. Brush* and *Andrews v. Swartz*, supra, that, even assuming that there was discrimination against negroes in the selection of jurors, that fact alone does not render a judgment of conviction void or authorize a Federal Court to review the same by writ of habeas corpus. The holding of those two cases has not, so far as we have been able to ascertain, been reversed by any subsequent decision either expressly or impliedly and the Circuit Courts of Appeal and District Courts still regard it as the law.

See:

Jugiro v. Brush (140 U. S. 291),
United States v. House (110 F. 2d 797; C. C. A. 9, 1940),
United States v. Hunt (117 F. 2d 30; C. C. A. 2, 1941),
Kelly v. Ragen (129 F. 2d 811; C. C. A. 7, 1942),
Moore v. King (130 F. 2d 857; C. C. A. 8, 1942),
Hawk v. Olson (130 F. 2d 910; C. C. A. 8, 1942),
Smith v. Olson (44 F. Supp. 456; D. Neb., 1942),
Elliott v. Commonwealth (45 F. Supp. 902; W. D. Ky., 1942),
Wheeler v. Kaiser (45 F. Supp. 937; W. D. Mo., 1942),
Coates v. Lawrence (46 F. Supp. 414; S. D. Ga., 1942).

See also:

52 A. L. R. 927.

The cases in which this Court has intervened because of racial discrimination in the selection of juries have involved reviews of the action of the highest State Courts in upholding convictions. *Pierre v. Louisiana* (306 U. S. 354), *Smith v. Texas* (311 U. S. 128), *Hill v. Texas* (316 U. S. 400) and the cases cited on page 16 of Petitioners' Brief. In no case has this Court reviewed such a question in a habeas corpus proceeding but on the contrary in *Wood v. Brush* and *Andrews v. Swartz*, supra, has held that the question cannot be reviewed in that manner.

As a means of insuring comity between the Courts of the Federal Government and those of the Governments of the several States, this Court said many years ago that it should be the policy of the Courts of each system to refrain from doing anything which would conflict with the exercise of their powers in the domain respectively set apart to each. See *Ex Parte Royall* (117 U. S. 241). A corollary of this principle is the rule that "The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist." *United States v. Tyler* (269 U. S. 13). Unless the circumstances of the trial in the State Court are such as to "undermine and invalidate the judgment upon which the Petitioner's imprisonment rests", the Federal Court will not act. *Smith v. O'Grady* (312 U. S. 329).

The record in the case at bar does not disclose that "exceptional circumstances of peculiar urgency exists." The Petitioners do not complain that their trial was not fair and orderly in every respect except the selection of the jury. There was no howling mob outside the Court room door; there was no duplicity, pretense or sham practiced upon any of the prisoners by the attorneys for the State or by its officers; there was no denial of the right to have the

advice and protection of competent counsel; there was no refusal to make available to them any process which the State affords for the summoning of witnesses and otherwise making a defense; there was no unseemly haste in bringing the prisoners to trial or in the conduct thereof; and there was no charge of fraud of any kind. In the absence of any such circumstances, even though it were found that negroes had been excluded from the grand jury and the petit jury, it is clear that the Criminal Court of Baltimore City had jurisdiction during the entire trial. The convictions and commitments are, therefore, valid and the Federal Court should not release the Petitioners from the custody of the Respondent in this collateral proceeding.

B.

THE PETITIONERS WAIVED THEIR RIGHT TO COMPLAIN OF RACIAL DISCRIMINATION IN THE SELECTION OF THE GRAND JURY BY WHICH THEY WERE INDICTED AND IN THE IMPANELLING OF THE PETIT JURY WHICH TRIED THEM.

A prisoner in a state court may validly waive rights guaranteed to him by the Fourteenth Amendment and this is especially true when he is represented by competent counsel. This has been held with respect to the right to a twelve man jury, to the right to a jury selected without racial discrimination and to the right to be represented by counsel. See *Patton v. United States* (281 U. S. 276), *Johnson v. Zerbst* (304 U. S. 458), *Adams v. United States* (317 U. S. 269), *Cundiff v. Nicholson* (107 F. 2d 162; C. C. A. 4, 1939) and *Carruthers v. Reed* (102 F. 2d 933; *cert. den.* 307 U. S. 643, 1939).

Since 1869 it has been the law of Maryland that objection to the mode of selecting persons as grand jurors must be taken advantage of by the prisoner by a plea in abatement or motion to quash before pleading to the merits and that, if a plea of not guilty is filed, the objection is

waived. *Clare v. State* (30 Md. 164), *Cooper v. State* (64 Md. 40; 20 Atl. 986), *Hollars v. State* (125 Md. 367; 93 Atl. 970), *Whittemore v. State* (151 Md. 309; 134 Atl. 322). This has also been the law in the Federal Courts for many years. See *United States v. Gale* (109 U. S. 65), *Kaizo v. Henry* (211 U. S. 146), *Powers v. United States* (223 U. S. 303).

It is conceded by the attorneys for the Petitioners, one of whom was among the three lawyers who represented them in their criminal trial, that they filed no motion to quash the indictment and took no other step to question its validity, that they filed pleas of not guilty on behalf of their clients and that no question as to the composition of the grand jury or the indictment which it returned was raised at any time during the trial.

For these reasons it cannot be successfully maintained that the Petitioners can for the first time now complain of the manner in which the grand jury that indicted them was chosen.

With reference to the right to complain of the selection of the petit jury, it is the law of Maryland that a defect in the entire panel of jurors may be reached only by a challege to the array. It is also the law of this State that such a challenge must be made before a challenge to the polls. See *Lee v. Peter* (6 G. & J. 447), *Hamlin v. State* (67 Md. 333, 10 Atl. 214) and *Ralph H. Alexander, etc., v. R. D. Grier & Son, Inc.* (No. 40 of the January, 1943 Term, in The Daily Record of Baltimore City of Apr. 8, 1943).

The record at bar shows that after some 52 jurors had been examined on their voir dire and challenged for cause one of the attorneys for the traversers for the first time raised the question now sought to be retried in the Federal Courts. His oral challenge to the array was sup-

ported by no proffer of testimony and there was no effort, or even request, made by any of the three experienced attorneys to argue the point to the Court (R. 121). It does not appear that the trial judge denied to these attorneys any such right. No authority is cited by the Petitioners for their statement in their petition for certiorari and in their brief to the effect that it was incumbent upon the trial judge personally to make a record on this point. Their experienced counsel, foreseeing the possibility of an appeal, must have known that there was no such duty on the Court but that it rested upon them. There must have been some other reason for failing to incorporate in the record some evidence of the situation which they claimed to exist. That reason could not have been surprise because the jury list was a public record and had been open to inspection by them at any time after it was drawn prior to the beginning of the September Term of the Criminal Court in 1941 (R. 119). It does not appear that lack of funds could have been the reason because the same attorneys subsequently made a very full presentation of the relevant evidence befor the United States District Court. And as far as fear of racial prejudice was concerned, the record clearly shows that immediately prior to the making of the oral challenge to the array the trial judge had ordered the jurors, who had already been chosen and were sitting in the box, to be excluded from the Court room (R. 38-39). We make no comment on the attenuated argument that the three skilled attorneys were frightened out of making a record on the point by the manner of the trial judge. Finally, the Petitioners cite no authority for their contention that their challenge to the array could reach to the composition of the grand jury as well as to the panel of petit jurors.

For cases on the general question of waiver, we refer to *Matter of Spencer* (228 U. S. 652), *Carruthers v. Reed*,

supra, Morton v. Henderson (123 F. 2d 48; C. C. A. 5, 1941), and *Johnson v. Wilson* (45 F. Supp. 597, aff'd 131 F. 2d 1; C. C. A. 5, 1942).

We believe that the principle so strongly set forth in these decisions of the Federal Courts must be applied to the case at bar and that this Court should concur in the finding of the two lower Federal Courts that the Petitioners' right to complain of the grand jury and of the petit jury was competently and intelligently waived by the Petitioners' attorneys.

C.

THERE WAS NO INTENTIONAL, ARBITRARY OR SYSTEMATIC DISCRIMINATION AGAINST, OR EXCLUSION OF, NEGROES IN THE IMPANELLING OF PETIT JURIES IN BALTIMORE CITY.

The law to be applied to this point is not in dispute. This Court has held in *Pierre v. Louisiana, Smith v. Texas* and *Hill v. Texas,* supra, that when the evidence shows that there are a number of negroes qualified as jurors and that inordinately few members of the race have, over a substantial period, actually served as jurors, a prima facie case of discrimination is proved and, if not disproved by evidence showing that more of the race have not served because of lack of qualifications or because of some other equally valid reason, constitutes a denial of the equal protection of the laws. The statement of the principle, made in *Virginia v. Rives* (100 U. S. 313) and affirmed many times since, that the Fourteenth Amendment to the Constitution only requires that the States and their public officials refrain from exclusion, and does not command inclusion, of negroes still holds true.

The Petitioners contend that the statistics introduced into evidence, coupled with certain portions of the testimony of the Jury Clerk, established a prima facie case from

which discrimination might have been inferred and that the testimony of the two Judges of the Supreme Bench of Baltimore City did not overcome that inference. When the whole record is closely analyzed, however, we believe that it clearly and fairly shows that no such inference was warranted and that, even if warranted, it was conclusively overcome.

While the 1940 census figures show that 19.3% of the total population in Baltimore was comprised of negroes, it did not show how many of the negroes were residents of Baltimore, were between the ages of 25 and 70 years and met the other qualifications for jury service. There was no evidence at all to show the comparative number of white and colored persons summoned from time to time by the Jury Clerk for examination by the Jury Judge; and there was no evidence as to what percentage of those who were rejected by the Jury Judge were negroes. Indeed, there was no evidence of any kind, other than the statistics introduced by the Petitioners, to show the total number of persons in Baltimore qualified for jury service or what percentage of that total were colored people. The figures as to the comparative numbers of those who actually served on juries during the period between 1933 and 1941 proved nothing because the numbers were determined in each instance by lot and not by design (R. 39, 73-74). The same thing was true of the total number of men who were summoned by the sheriff's office for the petit jury panels in 1940 and 1941 (R. 54, 57, 58, 66, 70, 71, 73, 74, 103, 104). Of course, the total of those actually summoned did not actually serve on the jury panels at any time during that period (R. 39, 88, 89, 103, 104).

For these and other reasons appearing in the record (R. 74-78), we submit that no inference of discrimination can properly be drawn in this case.

Even if, however, a scintilla of discrimination could be induced by resolving every doubt in favor of the Petitioners, it would be wholly dispelled by the affirmative and uncontradicted testimony of the Jury Clerk and of the two Jury Judges. Without challenge, all three testified of the special efforts which they took to place the names of negroes in the service file (R. 7, 46, 80, 81, 97, 98, 114). The testimony of the two Jury Judges showed conclusively that the majority of negroes most qualified for jury service fell into the classes of persons exempted from service by statute or by rule of the Supreme Bench and that the number of negroes in those classes constituted a small part of the total negro population (R. 86, 87, 100). Their testimony also showed that the remaining part of the negro population consisted largely of negroes disqualified by criminal records or insufficient literacy or excused because of the nature of their occupations (R. 21, 23, 100, 101). Though, in effect, the Petitioners have charged these Judges with dereliction of duty, they produced no rebuttal to all this testimony and cross-examined only one of them. In view of the Petitioners' admission that at no time did the Clerk or the Judges act with any bias against the negro race, these facts must weigh heavily against them in arriving at a conclusion. The testimony of these men was clear, full and unequivocal and, as an analysis of the entire record will demonstrate, completely rebutted any inference that might have been drawn.

The Petitioners assert that the ratio of negroes to whites in the service file and on the juries has remained substantially constant for the period of the past 9 years and "the same in peace times as in war times." For the second assertion no foundation can be found in the record, and in view of the figures appearing on page 39 of the record and of the Jury Clerk's testimony pages 52, 54 and 55 it is not apparent how the first assertion can truthfully be

made. From the figures on page 39 it will be seen that the number of white jurors varied from as high as 2171 in 1935 to as low as 1543 in 1941, the year when the Petitioners were convicted. It also appears that the number of colored jurors serving varied from as few as 18 in 1933 to as many as 40 in 1938. It is also significant that the number of colored men serving in 1941 was almost twice as many as those serving in 1933. When the composition of the 7 panels of 25 jurors each, who were drawn and served during the September term of Court in 1941, is studied, it will be seen that there were 8 negroes out of a total of 175, or a percentage of 4.57% (R. 107, 108). We believe that this evidence, all introduced by the Petitioners themselves, refutes their assertions and answers their argument that the ratio of negroes to whites serving on juries and jury panels was invariable and systematic. There was no evidence whatever to support the assertion as to the service file.

The Petitioners argue that *Smith v. Texas* and *Hill v. Texas, supra,* control here. But those two decisions are distinguishable on their facts, first, because in neither case was the final selection of jurors for actual service made by lot and, second, because in both cases it was clearly shown that those charged with the duty of selecting the jurors had "consciously omitted to place the name of any negro on the jury list."

In addition, it is important to remember that in *Pierre v. Louisiana, supra,* and in the above two cases, this Court was reviewing records of convictions affirmed by the highest courts of the States of Louisiana and Texas. In the case now presented the Court is not asked to review directly the affirmance of the judgment of conviction by the Court of Appeals of Maryland. On the contrary, in a proceeding collateral to the criminal trial itself in the State's courts,

the Court is asked to exercise its discretion by reviewing the findings of fact and conclusions of law made by two Federal Courts upon which sat four Federal Judges. Generally speaking, concurrent findings by the lower federal courts on questions of fact will be accepted by this Court unless clear error is shown. As was said in *Delaney v. United States* (263 U. S. 586), "It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength,—something more than this record presents." That observation is, we believe, peculiarly pertinent here.

Finally, it cannot be said that the Court of Appeals of Maryland has been or is deaf to the command of the Fourteenth Amendment. Recognition of the constitutional principle of non-discrimination was given as early as 1885 in the case of *Cooper v. State*, supra. In 1932 the Court again recognized the principle when it reversed the conviction of a negro by the Circuit Court for Baltimore County where for 26 years no negro had served as juror. See *Lee v. State* (163 Md. 56; 161 Atl. 284). On a second appeal of that case to the highest Court of Maryland the conviction was affirmed on a record which showed that the names of 6 colored men qualified to sit as petit jurors appeared in a panel of 200. *Lee v. State* (164 Md. 550; 165 Atl. 614). An application for certiorari was subsequently denied by this Court (290 U. S. 639). In the first of these appeals Chief Judge Carroll Bond said that "no positive action at all is required as a performance of the duty imposed by the Constitution; it requires purely a negative, the abstaining from exclusion of negroes from the competition of qualifications for selection of jurors, and the chance of gaining places on panels." It is most significant, we think, that this is almost exactly the same language which was used by the Supreme Court of the United States in stating the constitutional principle ten years later in *Hill v. Texas*.

We urge the Court to conclude that the concurrent findings of the District Court and of the United States Circuit Court of Appeals on the question of discrimination vel non are amply supported by the evidence in the record and should not now be reviewed.

The Court is not asked by the Petitioners to decide any novel question of law but to review in a collateral proceeding a judgment of guilty that was entered after a fair and impartial trial and was affirmed by the Court of Appeals of Maryland. The burden rests upon the Petitioners to satisfy this Court that the findings of fact and conclusions of law, made by the District Court and affirmed by the Circuit Court of Appeals, were clearly erroneous. This they have failed to do. It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari and that the petition for that writ should be denied.

Respectfully submitted,

WILLIAM C. WALSH,
Attorney General of Maryland,

D. HEYWARD HAMILTON, JR.,
Assistant Attorney General,

J. BERNARD WELLS,
State's Attorney of Baltimore City,

DOUGLAS N. SHARRETTS,
Asst. State's Attorney,

JOSEPH G. FINNERTY,
Asst. State's Attorney,

Attorneys for Respondent.